JOHN L. FALEN

v.

BUREAU OF LAND MANAGEMENT

IBLA 95-170 Decided February 12, 1998

Appeal by John L. Falen from a Decision of Administrative Law Judge Ramon M. Child in which he affirmed in part and reversed in part a Bureau of Land Management Decision finding John L. Falen guilty of willful trespass on the Black Mountain and Upper Crowley pastures in the Jordan Meadows allotment. Appellant Falen was ordered to pay $349.22 in total damages for 2 days' willful trespass in the Upper Crowley pasture. N2-92-2; N2-94-5.

Affirmed.

1. Administrative Procedure: Administrative Procedure Act--Administrative Procedure: Burden of Proof

   In a grazing trespass case, the burden of proof is properly placed upon BLM to establish by a preponderance of the evidence the occurrence of willful trespass. Appellant bears the burden of establishing error in BLM's decision that a willful trespass has occurred.

2. Grazing Permits and Licenses: Generally--Grazing Permits and Licenses: Trespass--Trespass: Generally

   Willful trespass means voluntary or conscious trespass, but does not include an act made by mistake or inadvertence. Conduct which is otherwise regarded as being knowing or willful does not become innocent through the belief that the conduct is reasonable or legal.

APPEARANCES: Karen Budd-Falen, Esq., and Frank Falen, Esq., Cheyenne, Wyoming, for Appellant; Burton J. Stanley, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Sacramento, California, for the Bureau of Land Management; C. Wayne Howle, Esq., Deputy Attorney General, Carson City, Nevada, for State of Nevada.

OPINION BY ADMINISTRATIVE JUDGE TERRY

John L. Falen appeals from the November 22, 1994, Decision of Administrative Law Judge (ALJ) Ramon Child in which the ALJ ruled upon two appeals from Decisions of the Paradise-Denio Resource Area Manager, Winnemucca District, Nevada, Bureau of Land Management (BLM) (N2-92-2 and N2-94-5), that were consolidated for hearing. The ALJ affirmed the November 7, 1991, BLM Decision (N2-92-2) to the extent it found Appellant had committed a willful trespass on August 16 and 17, 1991, in the Upper Crowley pasture of the Jordan Meadows Allotment, and that Appellant was liable for damages for this trespass in the amount of $349.22. The November 7, 1991, BLM Decision was reversed by the ALJ to the extent that it found Appellant committed a trespass on August 18 through September 21, 1991, in the Upper Crowley pasture of the Jordan Meadows Allotment, and to the extent that Appellant was liable for damages in excess of $349.22. 1/ The November 3, 1993, Decision by BLM (N2-94-5) finding Appellant had committed willful trespass on the Black Mountain pasture from August 1 through August 13, 1993, was affirmed, although no damages for this trespass were adjudged by BLM. 2/

The facts concerning the actions of the Appellant and the BLM in this appeal were accepted by the ALJ in the form of two stipulations (92-2-Stip. and 94-5-Stip.) presented by the parties. We likewise accept the facts as stated in the two stipulations and incorporate them by reference in this Decision. They establish the following material facts.

Upper Crowley

> Falen was to build a fence to protect riparian plants and aquatic habitat, and the parties anticipated the completion of the proposed fencing before the start of the 1991 summer grazing season. If the fencing was not completed before the summer use period, Falen's authorized season of use was June 15 - August 15, 1991, for 250-500 head of cattle and 624 AUM[']s [animal unit months]. His use following completion of the fencing was to be from June 15 to September 30, 1991, for 647-900 head and 1824 AUMs. On June 7, Falen turned out 97 head onto the Upper Crowley pasture. However, because

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1/ Total willful trespass damages adjudged against Appellant in the Nov. 7, 1991, BLM Decision totaled $10,664.89, which included the costs related to the Aug. 19, 1991, livestock count and damages of $10,403.08, representing 566 AUM's of forage purportedly consumed multiplied by $18.38 per AUM, which is twice the value of this forage.

2/ The regular rate was erroneously billed and collected by BLM for the willful trespass in the Black Mountain pasture from Aug. 1 to Aug. 13. See BLM's Decision in N2-92-2. No further action was taken before or during the hearing.

of difficulties, the time for completing the fence was extended until August 15. On two occasions, BLM formally advised Falen that cattle would have to be removed from the allotment if the fence was not completed by August 15. On August 13, Falen requested a 10-day extension of the August 15 deadline, which was denied by BLM on August 14. On August 17, 1991, the fence was completed.

In addition to the 97 head turned out on June 7, 275 were turned out on August 19, and 33 head on August 20, 1991. On August 30, Falen received a trespass notice. Falen then removed 24 head on August 30, 155 head on September 10, 213 head on September 15, and 203 head on September 21, 1991. According to the Actual Use Report, as many as 595 head of Falen's cattle were grazed at any one time in the Upper Crowley Pasture between August 16 and September 21, 1991.

Black Meadow

Falen was authorized to graze 228 cattle and 457 AUMs from June 1 until July 31, 1993. It is undisputed that Falen entered the allotment on July 31 and grazed cattle after the end of his grazing season as follows: August 1 - August 10, 213 head were on the pasture; August 11, 55 head were on the pasture; August 12 - August 13, 27 head of cattle were on the pasture. On August 9, 1993, Falen received a Notice of Trespass. The Actual Grazing Use Report shows 295 head on the pasture from August 1 - August 13, 1993.

Since the ALJ reversed BLM's Decision to the extent it found trespass in the Upper Crowley pasture after the completion of the fence on August 17, the issue on appeal concerning the 2 days before completion of the fence is whether the ALJ's Decision sustaining the trespass should be reversed on the grounds of lack of intent, good faith effort to timely construct the fence, and the assertion that BLM's objectives of protecting certain habitat were achieved. In addition, Appellant argues that his interpretation of the agreement with BLM, found by the ALJ to be as reasonable as BLM's (which required him to be off the pasture if the fence was not timely completed) should be a mitigating factor in support of reversal.

The sole question presented with respect to the Black Meadow pasture is whether Falen's belief that he could remain in the pasture beyond his period of use to fully utilize all his AUM's, and his allegedly prompt action in removing the cattle 3 days after notice, is an adequate basis for reversing the Decision finding a trespass, especially when BLM's range management objectives purportedly were achieved, despite Falen's actions.

Appellant contends the Judge erred in two respects in his November 22, 1994, Decision. First, Appellant contends the ALJ improperly placed the

burden of proof in this case on Appellants. (Statement of Reasons (SOR) at 18-20.) Second, Appellant asserts that the ALJ improperly failed to consider the permittee's mens rea or intent, and the mitigating facts and circumstances surrounding the alleged violations in determining whether the trespass was willful. (SOR at 20-38.) Appellant alleges that Judge Child summarily concluded that the permittee intended to trespass since he intended to graze the area. This standard, Appellant claims, excludes the possibilities of good faith or innocent mistake. (SOR at 20, n.18.)

The BLM has responded directly to both arguments. First, Respondent readily concedes that it bears the burden of proving that Appellant committed trespass. (Answer at 1.) Citing Klump v. Bureau of Land Management, 130 IBLA 119 (1994), Respondent correctly argues that while the burden of proving trespass rests with BLM, the burden of showing error in the Decision appealed from rests with Appellant. Id. at 2. Respondent further contends that Appellant's stipulation of the location, time of year, and number of cattle on the allotment enabled Respondent to meet its burden of proving willful trespass. Id. at 2-3.

To support his claim, Appellant engages in a lengthy discussion of the proper scope of review before an ALJ in a grazing appeal and before this Board when the ALJ's Decision is appealed. This discussion is offered as the predicate for asserting that Judge Child improperly allocated the burden of proof to Appellant. We do not perceive how Appellant's discussion of the scope of review on appeal, whether before the ALJ or this Board, articulates or establishes an improper allocation of the burden of proof in this case. Moreover, Falen cites no example in the record or in the November 22, 1994, Decision, that reflects the improper assignment of the burden of proof, and we found none.

[1] As we stated in Klump v. Bureau of Land Management, supra, at 127, n.12, while the burden of proving willful trespass rests on BLM, the burden of showing error in the Decision appealed from, rests with Appellant. The ALJ applied this standard throughout the proceeding, and we find no error in the assignment of the burden of proof at trial. We also find that the BLM carried its burden by establishing willful trespass by a preponderance of the evidence, both with regard to the Upper Crowley pasture on August 16 and 17, 1991, and the Black Mountain pasture on August 1-13, 1993, through the parties' stipulations, and the testimony of the Area Manager. (Tr. 11-80; 92-2-Stip.; 94-5-Stip.)

[2] Appellant's second claim of error concerns the adequacy of the ALJ's finding regarding willful trespass. (Decision at 6-8, 9-10.) In response to Appellant's claim that the ALJ erred in not considering his good faith or innocent mistake, Respondent BLM asserts that Appellant knew, on both occasions, that his cows were not authorized to be where he knew them to be. (Answer at 4.) Respondent further argues that Appellant may not ignore the direction of the Area Manager, expressed to him in writing before the trespasses took place, without incurring the penalties sought by Respondent. (Answer at 4.)

The term "willful trespass" is defined in the regulations as follows:

> "Willful trespass" means the voluntary or conscious trespass as defined at § 2801 of this title. The term does not include an act made by mistake or inadvertence. The term includes actions taken with criminal or malicious intent. A consistent pattern of trespass may be sufficient to establish the knowing or willful nature of the conduct, where such consistent pattern is neither the result of mistake or inadvertence. Conduct which is otherwise regarded as being knowing or willful does not become innocent through the belief that the conduct is reasonable or legal.

43 C.F.R. § 2800.0-5(v)(1991).

In Cheek v. United States, 498 U.S. 192, 201 (1991), the Court reiterated its determination that the standard for willfulness is the "voluntary, intentional violation of a known legal duty." Thus, we must examine Falen's conduct in determining the reasonableness of Appellant's claims. With respect to the willful trespass in the Upper Crowley pasture on August 16 and 17, 1991, the May 30, 1991, full force and effect Decision personally delivered to Appellant addresses use of this pasture after August 15, 1991, in two sections. Under a section entitled "Prior to Implementation," the Decision provides:

> Prior to the completion of any of the projects to protect and improve aquatic habitats and in the event that proposed fences are not constructed in the Upper Crowley pasture prior to the 1991 summer use period, grazing use will be as follows [in the Upper Crowley pasture: 250 to 500 cows (624 AUM's) from June 15 to August 15.]

(Ex. A-12, 9-11.) The May 30 Decision further states in the "Partial Implementation" section:

> In order to expedite the implementation of selected action to fence the streams, temporary electric fence may be constructed on the public portions of Crowley Creek in the Upper Crowley pasture to restrict livestock access to the majority of the stream. This would be done in conjunction with the construction of permanent fencing built around the private lands containing the headwaters of Crowley Creek in the Upper Crowley pasture prior to completion of the remaining projects in the summer pastures will be as follows [for the Upper Crowley pasture: 647 to 900 cows (1824 AUM's) from June 15 to September 30.]

(Ex. A-12, 6-8.) The ALJ found that this language unequivocally states that Falen was not authorized to graze livestock in Upper Crowley after August 15 until he completed the fence. (Decision at 7.) Falen clearly indicated his understanding of this requirement in applying for an extension of the August 15 removal date. The Area Manager denied this request

on August 14. That Appellant's subsequent 2-day trespass was willful is demonstrated by his testimony that he thought it "ridiculous" that he should be required to remove his cattle, only to return them to the pasture upon fence completion. (Tr. 107, 114-15.) Thus, by his own admission, Falen intended to remain on the pasture although he had not completed the fence.

With regard to the alleged willful trespass in the Black Mountain pasture from August 1 through 13, 1993, there is no dispute that Falen grazed his cattle on the pasture after the July 31, 1993, removal date. His cattle were on the pasture from August 1 through August 13. Appellant contends, however, that there was no trespass because his authorized 1-month delay in turnout into this pasture gave him license to remain beyond the normal removal date of July 31, 1993. We disagree. The May 30, 1991, Decision made specific provision for changes in authorized use dates, and advance approval from BLM under the May 30 Decision to change the livestock removal date was required. (May 30, 1991, Decision at 6.) No such approval was sought or given in this case. Nor was this requirement unknown to Appellant. Evidence adduced at the hearing indicated Appellant in the past had discussed proposed changes with BLM and had always followed these discussions with a written application for a change in dates. See Tr. 40.

Appellant's arguments notwithstanding, it is clear that Judge Child did indeed consider the evidence of Falen's intent and the circumstances attending the trespasses here at issue in reaching his decision to reverse in part. Appellant has shown no error in the way in which the judge assessed the evidence or the credibility of the witnesses, and we perceive none.

We thus find, as in the case of the Upper Crowley pasture in 1991, that Appellant's claim that he was authorized to graze in the Black Mountain pasture after July 31, 1993, to be supported neither by good faith nor innocent mistake. See Eldon Brinkerhoff, 24 IBLA 324, 338, 83 Interior Dec. 185, 191 (1976).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decision appealed from is affirmed.

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James P. Terry
Administrative Judge

I concur:

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T. Britt Price
Administrative Judge